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In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. ~~75-358~~

MICHAEL TROISE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISION	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	13
CERTIFICATE OF SERVICE	14

APPENDIX

Opinion and Judgment of Fifth Circuit ..... App. 1

Judgment and Commitment, USDC, So. Dist. of Fla. ..... App. 5

United States Code
18 U.S.C. §2; 21 U.S.C. §§841(a)(1) and 846 App. 7

TABLE OF CASES

Case	Page
McLawhorn v. North Carolina, 484 F.2d 1 (4th Cir. 1973)	3, 11, 12
Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957)	2, 7

UNITED STATES CODE

18 U.S.C. §2	3
21 U.S.C. §§841(a)(1) and 846	3, 8, 10
28 U.S.C. §1254(1)	2

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Petitioner Michael Troise prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 27, 1975.

OPINION BELOW

This case has been decided without a formal opinion being prepared for publication in the permanent law reports. See 515 F.2d 1182. The unpublished opinion of the Court of Appeals appears in the appendix (Ap. A, pp 1). The judgment and commitment order entered by the United States District Court for the Southern District of Florida, is unreported and appears in the appendix (Ap. B, pp 5).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 27, 1975. A timely petition for rehearing was denied July 25, 1975. An order extending the time to file this petition for writ of certiorari until September 8, 1975, was entered by order of this Court on August 7, 1975, under Case No. A-109. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I

Whether or not the denial of petitioner's right to disclosure of the identity of the informer resulted in a misapplication of the principle of law announced for disclosure of an informer set forth in *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) where the informer in the case, sub judice, had taken a material part in the criminal activity including

arrangement of meetings and being present with the undercover government agent at all critical times and where the critical facts were adduced by the *sole* testimony of the undercover agent and where the informer's testimony could have contradicted or amplified upon petitioner's scienter.

II

Whether or not the denial of petitioner's right to disclosure of the identity of the informer directly collides with the decision of the Fourth Circuit in *McLawhorn v. North Carolina*, 484 F.2d 1 (4th Cir. 1973) requiring disclosure of the informer where the informer in the latter case, as the informer in this case, had made a phone call to arrange a meeting for the sale of narcotics and was present and observed all matters connected with the sale and the negotiations.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §2; 21 U.S.C. §§841(a)(1), 846 (Ap. C).

STATEMENT OF THE CASE

Petitioner, Michael Troise, was charged with conspiracy to violate 21 U.S.C. §841(a)(1) by committing certain overt acts in violation of 21 U.S.C. §846. He was charged also with two substantive counts of knowingly and intentionally possessing with intent to distribute approximately 375 grams of cocaine and with knowingly and intentionally distributing said cocaine.

A Donald Gould was charged with petitioner. Gould later pled guilty on the conspiracy count, and the substantive counts against Gould were dismissed.

Petitioner filed a motion to disclose the name and address of the confidential informer. The motion was denied without prejudice to renew same at trial. At the commencement of the trial proceedings the motion for disclosure was renewed. After a hearing and argument the motion was denied. It was again renewed at a later stage of the trial proceedings and, in addition, defendant's counsel sought a continuance to interview the informer. The motions were denied.

The jury found petitioner guilty on all three counts. He was ordered committed for a period of 5 years as to each count with the sentences to run concurrently.

Drug Enforcement Administration Agent Brown stated at the hearing on the motion to disclose the name and location of the confidential informer that he did not know his present location. Brown conceded that he understood from a preliminary hearing that defense counsel asked the government to keep in contact with the confidential informer in the event the Court ordered him produced. Agent Brown admitted that the informer had been a paid employee during the critical period of time involving the charges against the defendant. Brown admitted that the confidential informer introduced him to the defendant, Gould, and that the informer was with him at the time of the delivery of the cocaine. The informer was also present during all conversations with Gould and agent Brown at the time of the delivery as well as at the time that the petitioner was seen by Brown, Gould and

the informer. Also, according to agent Brown, petitioner's only statement to Brown was made in the presence of the informer.

Facts adduced at the trial were that Agent Brown met with the confidential informer on August 15, 1973. They went to the Miami Shores Quality Cleaners and met with petitioner's co-defendant Gould to negotiate for the purchase of a pound of cocaine. The deal was to take place the next day. On the following day, Brown and the informer met Gould at a restaurant known as Sambo's. Gould stated to Brown and the informer that everything was set to go and that he was meeting his source at the latter's office on 79th Street (Miami). Gould left the restaurant as did Brown and the informer. Other agents observed Gould go into a building on 79th Street (Miami).

Petitioner was observed going to the cleaners later in the afternoon and then going back to the office on 79th Street.

Later, agent Brown received a telephone call from the informer. Pursuant to the call, Brown and the informer met and proceeded to the Miami Shores Quality Cleaners.

After arriving at the cleaning store they were advised by Mr. Gould that his connection for the cocaine would be there at approximately 6:30 p.m. Gould, Brown and the informer went to the back of the cleaners where Brown gave $13,500 to Gould. The latter counted the money, separated it into bundles and handed it back to Brown.

At approximately 6:30 p.m., Gould went out to a 1966 Blue Thunderbird, which had just arrived. He had

a short conversation with the driver (petitioner) and then returned back inside the cleaners. Gould advised Brown that the petitioner was the source for the pound of cocaine. Brown testified that Gould advised him also that the main man would not bring the cocaine and that he was sending somebody else. Gould asked Brown and the informer to go back inside the cleaners as he did not want his source to see them.

Petitioner moved the Thunderbird across the street into a parking lot adjoining Uncle John's Restaurant. At approximately 6:40 p.m., petitioner was seen by Brown talking to someone in front of the restaurant and at this time petitioner was not carrying a brown coat. Then, the petitioner went into the restaurant and was later seen crossing the street carrying the coat over his arm. At this time the informer and Brown walked to the back of the store. Petitioner carried the brown jacket into the store and stated to Gould, "Here is my laundry; here is my cleaning." Gould brought the jacket in the back to the informer and Brown and removed the plastic bag containing a white powdery substance from the jacket. Then Brown gave the money and the brown jacket to Gould who walked toward the front of the cleaners.

When Agent Brown went to the front of the cleaning store with the informer, Brown walked directly by petitioner and the latter, according to Brown, stated "I'm sorry I held you up." Brown testified that he replied "No problem, I will see you the next time." Brown admitted that the confidential informer was approximately three to four feet from Troise when he allegedly made the statement to Brown.

Although other agents observed Troise carrying the brown jacket over his arm to the cleaners and leaving the cleaners with the coat, the agents differ in their testimony as to whether Troise went into his automobile with the coat (and money) and left with the coat or whether another individual in an automobile next to petitioner left with the brown jacket (and money).

REASONS FOR GRANTING THE WRIT

1. The denial of petitioner's right to disclosure of the identity of the informer resulted in a misapplication of the principle of law announced for disclosure of an informer set forth in *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639 (1957) where the informer in the case, sub judice, had taken a material part in the criminal activity including arrangement of meetings and being present with the undercover government agent at all critical times and where the critical facts were adduced by the sole testimony of the undercover agent and where the informer's testimony could have contradicted or amplified upon petitioner's scienter.

The Fifth Circuit misapplied the principle of law announced in *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) to the fact and circumstances of the case, sub judice. In Roviaro, the Supreme Court was confronted with the propriety vel non of the nondisclosure of an informer's identity, where the defendant was charged with knowingly receiving, concealing, buying and facilitating the transportation and concealment after importation of heroin, knowing the same to be im-

ported into the United States. In the case, sub judice, Troise was charged in Count I with *knowingly* conspiring to violate 21 U.S.C. §841(a)(1) and in two counts with 1) *knowingly* and *intentionally* possessing with intent to distribute cocaine and 2) with *knowingly* and *intentionally* distributing cocaine.

The informer in *Roviaro* had taken a material part in bringing about the possession of certain drugs by the accused and had been present with the accused at the occurrence of the alleged crime. Roviaro's request for the identification and address of the informer was denied by the trial court, which denial was affirmed by the Seventh Circuit.

This Court in *Roviaro* stated that the government's privilege to withhold from disclosure the name of an informer is subject to an important limitation described by this Court in the following language:

> "A further limitation on the applicability of the privilege arises from the fundamental requirement of fairness. Where the disclosure of an informer's identity or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to the fair determination of a cause, the privilege must give way."

This Court in *Roviaro* in determining whether disclosure should be made stated that it depends on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors. It, of course, becomes necessary to advert to

the facts and circumstances of the case, sub judice, and to apply the *Roviaro* standard in order to determine the correctness vel non of the Fifth Circuit's affirmance of the District Court's order denying disclosure of the informer's identity.

Briefly, the DEA undercover agent, Brown, was introduced to Donald Gould by the informer. On August 15, 1973, Brown met with the informer and the two went to see Gould concerning negotiations as to the price of cocaine, etc. Later, the informer and Brown met with Gould again to make further arrangements for the purchase of the narcotics.

Subsequently the informer arranged a meeting between Gould and Brown at Gould's cleaning plant. The informer was with Brown when petitioner entered the cleaning plant with a sports jacket in which the cocaine was placed. The informer was present also when Brown gave the money and the brown jacket back to Gould. When Brown and the informer walked past petitioner, the latter allegedly stated to them: "I'm sorry I held you up." Agent Brown was the only witness to testify as to what occurred at the meetings with Gould and the informer.

Petitioner was observed leaving the cleaners with the sport coat but as to whether he went into his automobile with the coat containing the money or whether another person left with the coat is in conflict. It must be remembered also that petitioner did not have the coat with him when he first appeared across the street from the cleaning plant.

From the foregoing the Court overlooked that the jury could have inferred that Troise picked up the jacket from someone in a restaurant across the street from the cleaning plant. Also, there is no evidence that Troise looked in the jacket. Further, Troise was not present when the jacket was taken to the back room of the cleaning plant to be given to Brown in the presence of the informer. The coat was returned to Troise, who then took it back across the street and from the agents' testimony either left with it or gave it to a John Doe.

It is fundamental under 21 U.S.C. §841(a)(1) that Troise must have *knowingly* or *intentionally* distributed or dispensed or possessed with intent to distribute or dispense the narcotic substance contained in the jacket. *There is no evidence that Troise saw the substance contained in the jacket. There is no evidence that the money was counted out or seen by Troise.*

A jury may have inferred that petitioner was nothing more than a flunkie chosen to make a delivery of a substance (which he did not know the nature of) and therefore could not have been guilty of *knowingly* and *intentionally* possessing with intent to distribute or guilty of *knowingly* and *intentionally* distributing or guilty of *knowingly* and *intentionally* conspiring to distribute a controlled substance.

The facts and circumstances of this case demonstrate as the facts and circumstances in the *Roviaro* case that "the informer's possible testimony was highly relevant and might have been helpful to the defense." The only witness to testify as to the negotiations and dealings with Gould and also the contact with Troise was the DEA under-

cover agent Brown. Petitioner's opportunity to cross-examine Brown was hardly a substitute for an opportunity to examine the informer who had been with Brown and took part in the transaction. The informer had helped to set up the criminal occurrence by introduction and by arranging a crucial meeting in the negotiations. The informer was the only witness who might have testified to petitioner's possible lack of knowledge of the contents of the package in the sport coat that the latter picked up across the street from the cleaners and delivered to the cleaners.

Again, the only person, other than the petitioner (who is not required to take the stand) who could controvert, explain or amplify Brown's report of the critical events was the informer. Contradiction or amplification would have borne upon petitioner's knowledge of the contents of the package in the pocket of the coat.

In view of the foregoing, it is patently evident that the Fifth Circuit misapplied the law set forth in *Roviaro* by affirming the trial court's order denying disclosure of the identity of the informer.

2. The denial of petitioner's right to disclosure of the identity of the informer directly collides with the decision of the Fourth Circuit in *McLawhorn v. North Carolina*, 484 F.2d 1 (4th Cir. 1973) requiring disclosure of the informer where the informer in the latter case, as the informer in this case, had made a phone call to arrange a meeting for the sale of narcotics and was present and observed all matters connected with the sale and the negotiations.

In *McLawhorn v. North Carolina*, 484 F.2d 1 (4th Cir. 1973), the Court held that inasmuch as the informer was a participant in the incident which resulted in the arrest and conviction of the petitioner the identity of the informer should have been disclosed to the defense. The informer in *McLawhorn* made several calls to the latter in an effort to arrange a "buy" between McLawhorn and an undercover police officer by the name of Daughtry.

In the case, sub judice, the confidential informer telephoned the government's agent, Brown, and pursuant to the telephone conversation Brown and the informer proceeded to the cleaning plant where the transaction occurred for which Troise was arrested. It is obvious that the informer set up the meeting for the alleged criminal transaction as did the informer in *McLawhorn*.

The Fourth Circuit in *McLawhorn* held that the informer's testimony should be made available inasmuch as it was apparent that the informer through telephone calls arranged a sale and introduced McLawhorn to Daughtry. In addition, the informer was present and observed all matters connected with the sale and was involved with the negotiations. The Court found the informer's testimony was essential for the defendant to have a fair trial.

In like manner, in addition to arranging a meeting between Agent Brown and Gould for the sale of narcotics, the informer in the case, sub judice, was present and observed all matters connected with the sale and the negotiations. Thus, the Fifth Circuit's decision denying petitioner's right to the disclosure of the identity of the informer directly conflicts with the decision of the Fourth Circuit in *McLawhorn v. North Carolina, supra.*

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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and

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three copies hereof were mailed to the Solicitor General, Department of Justice, Washington, D.C. 20530, this ____ day of _____, 1975.

_____

APPENDIX

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 75-1094
SUMMARY CALENDAR*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-vs-

MICHAEL TROISE,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

[June 27, 1975]

Before COLEMAN, AINSWORTH and SIMPSON, Circuit Judges.

PER CURIAM:

Michael Troise seeks reversal of his convictions for conspiracy, possession and distribution of cocaine, 21 U.S.C. §§841(a)(1), 846. He alleges the trial court erred in not ordering the disclosure of the confidential informant in the case, and in its instructions to the jury on the conspiracy exception to the hearsay rule. We find these contentions to be without merit and affirm the convictions.

*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

On August 15, 1973, DEA Agent Brown met with a confidential informant. They went to the Miami Shores Quality Cleaners and met with appellant's co-defendant Gould to negotiate for the purchase of a pound of cocaine. The deal was set to take place the next day. They met with Gould on August 16, and he stated everything was set to go, that he was meeting his source at the source's office on 79th Street. Other agents observed Gould go into a building on 79th Street. They observed Troise go to the cleaners later in the afternoon and then go back to the office on 79th Street. Brown and the informant were advised the cocaine would arrive at the cleaners about 6:00 p.m. They proceeded there at 5:30. Troise arrived in a blue Thunderbird at about 6:30. Gould told the agent his source was driving the Thunderbird. Troise parked the car across the street and carried a brown jacket to the cleaners. It contained the cocaine. Brown gave Gould $13,500 for the cocaine. As Brown and the informant were leaving the cleaners, Troise told them he was sorry he had held them up. Troise then departed with the brown jacket.

Troise and Gould were indicted in November, 1973. Gould pled guilty in January, 1974. Troise's trial was reset numerous times. After several postponements, in August, 1974, he moved for disclosure of the informant. The motion was denied without prejudice to renew same at trial. Trial was set for December 16, at which time appellant renewed his motion for disclosure. After a hearing and argument the motion was denied. The jury found appellant guilty on all three counts.

In this appeal appellant alleges as errors the fact that the identity of the confidential informant was not disclosed, and that the court erred in its instruction on the co-conspirator exception to the hearsay rule.

The test for disclosure of an informant was set out in Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957):

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defense, the possible significance of the informer's testimony, and other relevant factors." 353 U.S. at 62, 77 S.Ct. at 628, 629.

We considered *Roviaro* in our decision in United States v. Toombs, 5 Cir., 1974, 497 F.2d 88. *Toombs* is very similar to the case at bar. There the disclosure of the informant was also asked for, but there was no showing of how disclosure would be helpful to the defense. Such is the case here. Entrapment was neither asserted nor argued. Based on the circumstances of the case, the court was correct in denying appellant's request for disclosure.

Appellant's other argument is that the court erred in its instruction to the jury concerning the conspiracy exception to the hearsay rule. The objected to instruction

came as the government called its first witness, Agent Brown, as he began testifying to the events that transpired on the 15 and 16 of August. Previously the court and counsel agreed that the testimony would be allowed in with the proviso that if the conspiracy was not proven, it would be stricken. Appellant now argues this amounted to a directed verdict of guilt.

At the time appellant did not object to the instruction, but only to the admission of the testimony. Thus any error must come under the plain error rule of F.R.Cr.P. Rule 52(b). Jury instructions must be considered in their entirety and within the context of the trial, United States v. Blue, 5 Cir., 1970, 430 F.2d 1286. Judged in that context, the court's instructions were not erroneous.

A review of the record reveals no errors of law.

The judgment of the District Court is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR
SOUTHERN DISTRICT OF FLORIDA

DOCKET NO. 73-777-Cr-JLK

Defendant: MICHAEL TROISE

JUDGEMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date December 31, 1974

WITH COUNSEL JAMES J. HOGAN, ESQ.

PLEA NOT GUILTY

There being a verdict of GUILTY.

FINDING & JUDGMENT

Defendant has been convicted as charged of the offense(s) of conspiring to violate Title 21, United States Code, Section 841(a)(1), knowingly and intentionally possessing with intent to distribute a quantity of cocaine, a Schedule II narcotic controlled substance, and knowingly and intentionally distributing a quantity of cocaine, a Schedule II narcotic controlled substance; all in violation of Title 21, United States Code, Sections 846, 841(a)(1), and Title 18, United States Code, Section 2, as charged in Counts 1, 2, and 3 of the Indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE OR PROBATION ORDER

FIVE YEARS as to each of Counts 1, 2 & 3, unless otherwise discharged by due process of law; it being further ORDERED AND ADJUDGED that the sentences of confinement shall run concurrently with each other, it being further ORDERED AND ADJUDGED that the defendant shall serve a Special Parole term of THREE YEARS as to each of Counts 1, 2 & 3 which shall run concurrently with each other, it is further ORDERED that sentence of confinement shall be STAYED until January 8, 1975 and on that date the defendant shall report to the Office of the United States Marshall at Miami, Florida, no later than 12 Noon to commence confinement sentence.

SIGNED BY

U.S. District Judge

JAMES LAWRENCE KING

Date Dec. 31, 1974.

APPENDIX C

18 United States Code

§2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

21 United States Code

§841.

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

§846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.